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No. 91-1398

In the Supreme Court of the United States

OCTOBER TERM, 1991

HERBERT S. WALDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conspiracy to defraud the United States by impeding the Internal Revenue Service, in violation of 18 U.S.C. 371, is governed by the five-year statute of limitations set forth in 18 U.S.C. 3282 or the six-year statute of limitations set forth in 26 U.S.C. 6531.

2. Whether the evidence was sufficient to support petitioner's convictions.

3. Whether the trial court properly instructed the jury on the "defraud" element of 18 U.S.C. 371.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25)[1] is reported at 941 F.2d 1544.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1991. A petition for rehearing was denied on December 18, 1991. Pet. App. 26-27. The petition for a writ of certiorari was filed on January 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Although the pages of the appendix are not numbered, for convenience this brief cites them as if they were numbered sequentially.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and aiding and assisting in the preparation and presentation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The district court sentenced petitioner to three years of imprisonment, five years of probation, and fines totaling $350,000. The court of appeals affirmed. Pet. App. 1-25.

1. In 1979, Earl Griffin contacted petitioner, a tax attorney. Griffin testified that he explained to petitioner that he had large amounts of undocumented cash from gambling transactions, which he wished to invest. Petitioner responded by forming a Liechtenstein corporation and a Georgia corporation that was a wholly owned subsidiary of the Liechtenstein corporation; Griffin transferred large amounts of cash through those entities and then, with petitioner's assistance, invested the cash in this country. Subsequently, Griffin's son Michael approached petitioner in a similar manner, asking for assistance in forming foreign corporations to enable him to dispose of some cash he possessed. Petitioner organized a similar Liechtenstein corporation, with a wholly owned Georgia subsidiary. Petitioner advised both of the Griffins that they should not purchase assets in their own name, because that would raise a red flag to the government. He also advised Michael Griffin and his wife Susan to draw salaries from the second Georgia subsidiary corporation to give the corporations the appearance of legitimacy, although neither Michael nor Susan did any work for the corporation. Finally, petitioner assisted the Griffins in preparing tax returns that did not accurately reflect the substance of the transactions that petitioner helped the Griffins complete. A jury convicted petitioner of one count of conspiracy to defraud the

United States, in violation of 18 U.S.C. 371,[2] and two counts of assisting Michael and Susan Griffin in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2). Pet. App. 5-13.

2. The court of appeals affirmed. Pet. App. 1-25. It rejected petitioner's argument that the indictment on the conspiracy count was barred by the five-year statute of limitations set forth in 18 U.S.C. 3282.[3] Pet. App. 13-20. Rather, the court held, the count was covered by the six-year statute of limitations set forth in 26 U.S.C. 6531. The court explained that the conspiracy to defraud the United States by impeding and impairing the IRS was covered by 26 U.S.C. 6531(1), which provides a six-year limitations period for "offenses involving the defrauding or attempting to defraud the United States * * *, whether by conspiracy or not." Pet. App. 13-20.

The court rejected petitioner's reliance on *Grunewald* v. *United States*, 353 U.S. 391 (1957). Pet. App. 15. In that case, this Court, in the course of elaborating rules for determining the duration of a conspiracy, stated that the predecessor to the five-year statute of limitations set forth in 18 U.S.C. 3282 governed a tax-related conspiracy under 18 U.S.C. 371. See 353 U.S. at 396. Following the lead of the Fourth Circuit in *United States* v. *Lowder*, 492 F.2d 953, cert. denied, 419 U.S. 1092 (1974), the court of appeals concluded that Section 3282 does not apply, explaining that

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[2] The conspiracy count alleged that the conspiracy had two objectives: first, to impede and impair the functions of the Internal Revenue Service; and second, to evade or defeat taxes by assisting in the preparation of false tax returns. See Pet. App. 13-14. The petition focuses on the first prong of the conspiracy.

[3] That Section provides: "Except as otherwise expressly provided by law, no person shall be prosecuted * * * for any offense, not capital, unless the indictment is found * * * within five years next after such offense shall have been committed."

> [t]he language was not part of the main holdings * * *; it was not with respect to any issue which was fully briefed and pressed; and it seems nothing more than mere inadvertence on the part of [the Court] that the specific language of §6531, and its predecessors was overlooked.

Pet. App. 16, quoting *Lowder*, 492 F.2d at 956. The court of appeals also noted that the *Grunewald* Court failed to cite either the predecessor to Section 6531 or its prior decision in *Braverman* v. *United States*, 317 U.S. 49 (1942), in which the Court held that the predecessor to Section 6531 applied to Section 371 conspiracies to defraud the United States by evading or defeating taxes, see 317 U.S. at 54-55. Accordingly, the court concluded that the six-year limitations period of Section 6531 applied. Pet. App. 18-19.

In a footnote at the close of its opinion, the court of appeals summarily rejected two of petitioner's additional contentions. First, it rejected his claim that the evidence of willfulness was insufficient, stating only: "We find this argument meritless." Pet. App. 25 n.16. Second, it rejected his challenge to the jury instructions, stating only: "[Petitioner] failed to object to the instruction at trial, and we find no plain error." 941 F.2d at 1551 n.16.[4]

ARGUMENT

1. Petitioner's principal argument (Pet. 16-21) is that the charge that he conspired to defraud the United States by impeding the functions of the Internal Revenue Service was barred because it was subject to the five-year period of limitation set forth in 18 U.S.C. 3282. That contention is refuted by the plain language of

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[4] We cite the F.2d printing of the opinion because the appendix to the petition fails to reprint that portion of the footnote. See Pet. App. 25 n.16.

Section 6531, as well as the settled course of decisions of the courts of appeals.[5]

Section 3282 of Title 18 provides for a five-year limitations period, "[e]xcept as otherwise expressly provided by law." Section 6531 of Title 26 clearly provides otherwise for the conspiracy involved in this case, by extending a six-year limitations period to "offenses arising under the internal revenue laws * * * involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not." 26 U.S.C. 6531(1). That language precisely covers tax conspiracies under Section 371 of Title 18, which proscribes any conspiracy "to defraud the United States." See Indictment 1 (charging that petitioner "did * * * conspire * * * to defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service"). All of the courts of appeals to consider the question have concluded that Section 6531(1) applies to a conspiracy to defraud the United States by impeding and impairing the Internal Revenue Service. See *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, 98-99 (2d Cir.), cert. denied, 462

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[5] In any event, the claim is not squarely presented by this case, because this prosecution would not have been barred even if the period of limitation were only five years. The indictment in this case was returned on March 23, 1990. Count 1 charged that the conspiracy lasted from on or about June 1, 1979, to on or about June 17, 1985. Indictment 1. It also alleged as an overt act petitioner's assistance in the preparation of the Griffins' income tax return for 1984, which occurred on April 8, 1985. *Id.* at 10. Given petitioner's conviction on Count 3, which charged petitioner with the substantive offense of assisting the preparation of a false return on that date, see *id.* at 11, the jury necessarily found that petitioner committed that overt act. Because the indictment was returned less than five years after April 8, 1985, the conspiracy charge would not have been barred even under the five-year statute.

U.S. 1131 (1983); *United States* v. *White*, 671 F.2d 1126, 1133-1134 (8th Cir. 1982); *United States* v. *Brunetti*, 615 F.2d 899, 901-902 (10th Cir. 1980); *United States* v. *Fruehauf Corp.*, 577 F.2d 1038, 1069-1070 (6th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Lowder*, 492 F.2d 953, 955-956 (4th Cir.), cert. denied, 419 U.S. 1092 (1974).

Petitioner claims (Pet. 20) that the decision in this case conflicts with this Court's decision in *Grunewald* v. *United States*, 353 U.S. 391 (1957). As discussed above, the principal issue in dispute in *Grunewald* was the method for determining the duration of a conspiracy for purposes of statutes of limitations, not the question of which statute applied. This Court's passing comment (see 353 U.S. at 396 n.8), which neither cited nor discussed the plainly applicable language of the predecessor to Section 6531, should not be interpreted as a dispositive holding on this point. Each of the courts of appeals to address the applicability of *Grunewald* has concluded, like the court below, that the six-year statute should govern. See *Ingredient Technology Corp.*, 698 F.2d at 98-99; *Lowder*, 492 F.2d at 955-956. Accordingly, the tension between the decision below and this Court's opinion in *Grunewald* does not require review by this Court.

Petitioner further contends (Pet. 17-20) that a conspiracy charged under 18 U.S.C. 371 has a six-year statute of limitations only if it falls within Section 6531(8), which covers conspiracies in violation of Section 371 that involve attempts to evade or defeat taxes; because the first prong of the conspiracy count—alleging a simple conspiracy to defraud the IRS by obstructing its functions—did not involve an attempt to evade or defeat taxes, he contends it is time-barred under Section 6531(8). In petitioner's view, subsection (8) would be surplusage if subsection (1) were construed, as it was by the court of appeals in this case, to encompass conspiracies

to defraud the United States. Pet. 17. Petitioner is incorrect. The language of subsection (1)—"offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner"—clearly encompasses a conspiracy to defraud under 18 U.S.C. 371. Nothing in the language of subsection (8) indicates that it is the exclusive limitations provision applicable to conspiracies under Section 371. Moreover, petitioner's reading is inconsistent with the history of subsection (8). Subsection (8) was added in response to *United States* v. *Scharton*, 285 U.S. 518 (1932), in which this Court held that the predecessor of subsection (1) did not apply to conspiracies to evade or defeat taxes. The new provision was intended only to restore the applicability of the longer period of limitations to all offenses, substantive or conspiratorial, involving such attempts. See H.R. Conf. Rep. No. 1492, 72d Cong., 1st Sess. 29 (1932). Thus, the enactment of subsection (8) carried with it no implication that subsection (1) should not apply to conspiracies to defraud.

2. Petitioner also asserts (Pet. 21-26) that the evidence was insufficient to support his conviction. Because "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals," *Hamling* v. *United States*, 418 U.S. 87, 124 (1974), that assertion does not warrant review in this Court.

In any event, the decision of the court of appeals was correct. The court of appeals (Pet. App. 25 n.16) correctly identified the standard of review, by referring to its decision in *United States* v. *Hooshmand*, 931 F.2d 725, 733 (11th Cir. 1991), which correctly stated that a court evaluating a claim of evidentiary insufficiency should examine the evidence in the light most favorable to the government and determine whether a factfinder could

find that the evidence establishes guilt beyond a reasonable doubt. See, *e.g.*, *United States* v. *Powell*, 469 U.S. 57, 67 (1984); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Petitioner's claim (Pet. 21) that the court relied upon the "any evidence" standard is without merit. Neither *Hooshmand* nor any of the other cases cited by petitioner articulates or rejects an "any evidence" standard. Nor is petitioner aided by *Ingram* v. *United States*, 360 U.S. 672 (1959). In that case, the Court reversed the convictions of two employees of an illegal gambling operation for conspiring to evade and defeat the payment of federal taxes imposed on lottery operations, because the employees lacked personal knowledge of the tax liability of the owners of the operation and therefore could not have had the intent to commit the substantive offense of evasion of payment of the taxes. *Id.* at 679-680. Nothing in *Ingram*, or the similar lower court cases on which petitioner relies (Pet. 23-26),[6] is in any way inconsistent with the standard of review applied in this case; those cases suggest only that a person cannot be convicted of a conspiracy to evade taxes without evidence that the person knowingly engaged in an enterprise the purpose of which was to evade taxes. In this case, the evidence of petitioner's knowledge of the tax-related purposes of his activities was abundant.

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[6] See *United States* v. *Krasovich*, 819 F.2d 253, 256 (9th Cir. 1987) (overturning a conviction for conspiracy to evade taxes because "[n]othing * * * suggests that [the defendant] knew the purpose of the concealment was to evade taxes"); *United States* v. *Pritchett*, 908 F.2d 816, 821 (11th Cir. 1990) (overturning a conviction for conspiracy to evade taxes because of the lack of evidence that defendants "knew that [the man they were assisting] was not filing tax returns and did not intend to pay his federal income taxes").

Petitioner set up corporations for Michael Griffin in Liechtenstein, a country that, at the time, permitted the beneficial owners of the corporations to remain secret. He caused businesses and properties owned by Michael Griffin to be held in the names of nominees and orchestrated several series of financial transactions designed to give the Griffins the appearance of legitimate businessmen and to hide the true source of their income. Petitioner caused Griffin to execute bogus promissory notes, to place false information on tax returns, and to camouflage income as non-taxable loans. Perhaps most telling, he advised both Griffins to take care not to make purchases in their own names, explaining to Michael Griffin that such actions "would raise a 'red flag' to the IRS." Pet. App. 5-9; Gov't C.A. Br. 17-18. That evidence was sufficient to permit the jury to determine that petitioner intentionally entered into an agreement with the Griffins, the purposes of which were to impede the IRS in its efforts to compute and collect taxes and to assist in the preparation of false income tax returns.

Petitioner nevertheless asserts (Pet. 22-23) that "it is undisputed" that he did not know either when the Griffins earned the money at issue or that the money had not already been taxed, and that he believed that the Griffins were wealthy and well-respected members of the community. But petitioner's assertions establish at most that he did not know the original unlawful source of the money. They do nothing to rebut the government's proof that he assisted the Griffins in their attempts to misrepresent their financial affairs to the IRS.

3. Finally, petitioner asserts (Pet. 27-29) that the trial court erred in instructing the jury on the elements of conspiracy to defraud the United States, by failing to include the element of intent to defraud the United States. Whether or not the court of appeals correctly determined that petitioner failed to object to the

instruction at trial, see 941 F.2d at 1551 n.16, that claim does not warrant review. The challenged instruction stated (Tr. 902):

> [A]s to Count 1, you will note that the defendant is not charged in Count 1 with violating Title 26, 7206(2), rather he is charged with having conspired to impede and impair the lawful functions of the United States Treasury, namely the Internal Revenue Service, in violation of Title 18, the United States Code, Section 371.

Petitioner asserts that the instruction was deficient because it referred only to "imped[ing] and "impair[ing]" the United States, and failed to refer to "defrauding" the United States. Pet. 27. But that assertion ignores the preceding portion of the instruction, which explained: "Count 1 charges and alleges that the defendant and others knowingly and wilfully *conspired to defraud* the United States by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service." Tr. 901 (emphasis added). Taken as a whole, see *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973), the court's instructions adequately set forth the elements of a conspiracy to defraud the United States. Furthermore, it would have been permissible for the trial court to omit reference to the word "defraud" from the instructions entirely. As this Court repeatedly has recognized, Section 371's definition of a conspiracy to defraud includes *any* conspiracy to impede and impair the functions of a government agency; the statute does not require additional proof of the elements of common law fraud. *E.g.*, *Dennis* v. *United States*, 384 U.S. 855, 860-861 (1966); *United States* v. *Johnson*, 383 U.S. 169, 172 (1966); *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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